Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

CHELO HENRY VILLARREAL-ALARCON, ROXANA C. VILLARREAL, ITALO H. VILLARREAL, GINO A. VILLARREAL,

Petitioners,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE NINTH CIRCUIT COURT OF APPEALS ERRED IN SUMMARILY DISMISSING PETITIONERS' PETITION FOR RELIEF FROM DEPORTATION SOLELY ON THE BASIS OF IIRIRA SECTION 309(C)(5) AS AMENDED BY NACARA SECTION 203(A) BECAUSE SAID SECTION IS IMPERMISSIBLY RETROACTIVE FOR APPLICANTS WHO WERE IN DEPORTATION PROCEEDINGS AND STATUTORILY ELIGIBLE FOR SUSPENSION RELIEF PRIOR TO APRIL 1, 1997 BUT WHO DID NOT HAVE THE MERITS OF THEIR CASES HEARD UNTIL AFTER IIRIRA SECTION 309(C)(5) BECAME EFFECTIVE.

II. WHETHER THE NINTH CIRCUIT COURT OF APPEALS CASELAW HAS CREATED A SITUATION WHICH VIOLATES THE EQUAL PROTECTION RIGHTS OF APPLICANTS SUCH AS THE VILLAR-REALS WHO WERE IN PROCEEDINGS AND HAD ACQUIRED THE REQUISITE SEVEN YEARS' CONTINUOUS PRESENCE PRIOR TO APRIL 1, 1997 BUT WERE UNABLE TO HAVE THEIR CASES HEARD UNTIL AFTER IIRIRA BECAME EFFECTIVE.

LIST OF PARTIES

1. Henry Chelo Villarreal, Roxana Villarreal, Italo C. Villarreal, Gino A. Villarreal

2. John Ashcroft, Attorney General

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Chelo Henry Villarreal-Alarcon, Roxana C. Villarreal, Italo C. Villarreal, and Gino A. Villarreal ("the Villarreals") respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals in and for the Ninth Circuit, entered on June 8, 2001, in the above-entitled proceeding.

OPINIONS BELOW

In the Matters of Chelo Henry Villarreal-Alarcon, Roxana C. Villarreal, Italo Villarreal, Gino Villarreal, Oral Decision of the Immigration Judge, December 1, 1997.

In re Villarreal, Order, Board of Immigration Appeals, March 31, 2000.

Villarreal v. INS, Unpublished Opinion, United States Court of Appeals for the Ninth Circuit, filed March 28, 2001.

Villarreal v. INS, Order, United States Court of Appeals for the Ninth Circuit, filed June 8, 2001.

JURISDICTIONAL STATEMENT

The Ninth Circuit Court of Appeals dismissed Petitioners' petition for review on March 28, 2001. Petitioners filed a Petition for Rehearing which was summarily dismissed on June 8, 2001. This Court has jurisdiction to

review the Ninth Circuit Court of Appeals' dismissal pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

IIRIRA Section 309(c)(5)

(5) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION –

(A) IN GENERAL – Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act), as in effect before [April 1, 1997], issued before, on, or after the date of enactment of this Act [September 30, 1996].

(B) EXCEPTION FOR CERTAIN ORDERS – In any case in which the Attorney General elects to terminate and reinitiate proceedings in accordance with paragraphs (1) and (2) of Section 240A(d) of the Immigration and Nationality Act shall not apply to an Order to Show Cause issued before April 1, 1997.

Immigration and Nationality Act Section 240A(d)

(1) For purposes of this section, any period of continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible . . . or removable from the

United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsection (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

STATEMENT OF THE CASE

The Villarreals are natives and citizens of Peru. They entered the United States on October 26, 1989. The Immigration and Naturalization Service ("Service") issued orders to show cause ("OSCs") on September 7, 1995, placing them in deportation proceedings.

On March 28, 1996, the Villarreals appeared before the Immigration Judge, admitted the factual allegations in the OSC and conceded the charge of deportability. At that hearing, Respondents requested relief in the form of suspension of deportation. The matter was continued to October 28, 1996 for a hearing on the applications for suspension of deportation. As of October 28, 1996, the Villarreals had the seven years' continuous presence and IIRIRA Section 309(c)(5) was not yet in effect. Therefore, from October 28, 1996 until April 1, 1997, the Villarreals were statutorily eligible for suspension of deportation relief.

The October 28th hearing was reset to November 27, 1996 as the Immigration Judge was unavailable on October 28th. On November 27, 1996, the Petitioners submitted their suspension applications with supporting documents. The case was then rescheduled for June 19, 1997.

Before the next hearing date, the law on continuous presence in suspension cases changed drastically. On February 11, 1997, Judge Creppy issued a memo which prohibited the granting of suspension cases because IIRIRA Section 309(c)(7) had imposed a cap of 4000 suspension grants effective April 1, 1997. Subsequent amendments to the statute demonstrate that the cap did not apply to cases prior to April 1, 1997. *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999).

On April 1, 1997, IIRIRA Section 309(c)(5) went into effect, providing that in order to satisfy the seven-year continuous presence requirement, an applicant must have accumulated seven years' presence from their date of entry and before the issuance of an OSC. The issuance of the OSC cuts off the time.

On June 18, 1997, the Immigration Judge granted a motion to continue the case to December 1, 1997. On December 1, 1997, the Immigration Judge denied the suspension applications solely based on the 309(c)(5) issue – namely that between the date of the Villarreals' entry into the United States and the issuance of the OSC, the Villarreals had not accumulated seven years' continuous presence. She did specifically state that "These are very favorable applications. I'm very impressed with the family, the written form already and I have no doubts

that they could be consistent orally, how be it they choose not to make an advisory decision. I have no choice today, however, because the law is very severe and is still being interpreted in that matter." See Oral Decision and Order, App. 3-5.

On December 16, 1997, the Villarreals filed a timely Notice of Appeal with the Board of Immigration Appeals. They submitted a brief in support of that appeal on June 19, 1998. On March 31, 2000, the Board of Immigration Appeals dismissed the appeal.

The Villarreals then filed a petition for review with the Ninth Circuit Court of Appeals.

While this appeal was pending, *Ram v. INS*, 243 F.3d 510 (9th Cir., February 8, 2001) was published. This case held that

> IIRIRA Section 309(c)(5) generally applies the stop-time rule to transitional rule aliens whose deportations were initiated with the service of an OSC and who seek suspension of deportation. *Ram v. INS*, 243 F.3d 510, 516 (9th Cir. February 8, 2001).

On March 28, 2001, the Ninth Circuit Court of Appeals denied the petition based on the *Ram* holding. See denial, App. 1-2.

However, the law on retroactive application of Section 309(c)(5) has not yet been settled. After *Ram*, the Ninth Circuit published its decision *Guadalupe-Cruz v. INS*, 240 F.3d 1209 (9th Cir., February 27, 2001). This case held that IIRIRA Section 309(c)(5) could not be applied retroactively to a case heard by an Immigration Judge before IIRIRA's date of enactment (April 1, 1997). In

Guadalupe-Cruz, the Ninth Circuit Court of Appeals cited *Astrero v. INS*, 104 F.3d 264 (9th Cir. 1996) (holding that IIRIRA Section 309(c)(5) does not apply to individuals in proceedings before April 1, 1997).

On April 6, 2001, Petitioners filed a petition for rehearing discussing the changes in the law since the *Ram* holding.

On June 8, 2001, the Ninth Circuit Court of Appeals summarily denied the petition for rehearing. See denial, App. 18.

On July 6, 2001, Petitioners filed a writ of habeas corpus and a request for a stay of deportation. The District Court has granted a stay of deportation. The writ of habeas corpus is currently pending.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT COURT OF APPEALS ERRED IN SUMMARILY DISMISSING PETITIONERS' PETITION SOLELY ON THE BASIS OF IIRIRA SECTION 309(c)(5) AS AMENDED BY NACARA SECTION 203(A) BECAUSE SUCH INTERPRETATION CREATES AN IMPERMISSIBLY RETROACTIVE EFFECT FOR APPLICANTS WHO WERE IN DEPORTATION PROCEEDINGS AND STATUTORILY ELIGIBLE FOR SUSPENSION RELIEF PRIOR TO APRIL 1, 1997 BUT DID NOT HAVE THE MERITS OF THEIR CASES HEARD UNTIL AFTER THAT DATE.

The decision of the Ninth Circuit Court of Appeals is legal error because by its plain language, IIRIRA Section

309(c)(5), as amended by NACARA Section 203(a) (the "stop-time rule"), does not apply to Petitioners. The statute only applies to applications for cancellation of removal, and not to suspension of deportation applications, such as those of Petitioners. Even if IIRIRA Section 309(c)(5) could apply to suspension of deportation cases in general, the statute should not apply to the present case where the Petitioners were in proceedings prior to April 1, 1997, had accumulated seven years' continuous presence prior to April 1, 1997, and never had a merits hearing[1] because their cases were continued until some date after IIRIRA became effective.

As such, the Ninth Circuit Court of Appeals erred in summarily dismissing the petition and denying suspension of deportation on the sole ground that the service of the OSC terminated their ability to demonstrate seven years of continuous physical presence.

The Ninth Circuit Court of Appeals as well as other Circuit Courts of Appeals have addressed the issue of the retroactivity of IIRIRA Section 309(c)(5) as it applies to suspension of deportation cases. However, the Circuits have not addressed retroactivity using the standards laid out in *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). Nor have they addressed retroactivity as it pertains to cases in which an applicant for suspension of deportation was statutorily eligible for relief prior to April 1, 1997 but did not have

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[1] In the present case, Petitioners *never* had a merits hearing. In *Ram v. INS*, the Petitioners had a merits hearing before they had accumulated seven years. While their case was on appeal, they accumulated the seven years and then had their case remanded on those grounds.

his/her merits heard until after that date. As discussed below, IIRIRA Section 309(c)(5) as interpreted by *Ram* creates an impermissibly retroactive effect in these cases.

1.

CONGRESS DID NOT INDICATE WITH THE REQUISITE CLARITY THAT IIRIRA SECTION 309(c)(5) SHOULD BE APPLIED RETROACTIVELY TO ALL SUSPENSION OF DEPORTATION CASES.

This Court has recently found that although Congress has the power to enact laws with retroactive effect, "a statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such result." *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). This Court further found that:

> The standard for finding such unambiguous direction is a demanding one. '[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute involved statutory language that was so clear that it could sustain only one interpretation.' *Id.* citing *Lindh v. Murphy*, 521 U.S. 320, 328, n. 4 (1997).

The Ninth Circuit Court of Appeals found that Congress showed a clear intent to apply the stop-time rule retroactively and that therefore, no further inquiry into the consitutionality of retroactive application of the statute is required. *Ram v. INS*, 243 F.3d 510, 517. However, the language in IIRIRA Section 309(c)(5) does not meet the standard for clarity as articulated in *St. Cyr*.

Congress created a special transitional rule, IIRIRA Section 309(c) for certain suspension applicants placed in

proceedings prior to April 1, 1997, the effective date for the new provisions. *See* IIRIRA Section 309(a). IIRIRA Section 309(c) contain specific exceptions to Section 309(a) for aliens in proceedings prior to the April 1, 1997 effective date for the new provisions. That rule contains specific exceptions to the general rule that the new provisions of IIRIRA not be applied to cases pending on April 1, 1997. One transitional rule relevant to applications for suspension of deportation, IIRIRA Section 309(c)(5), was amended by NACARA. The amendment was deemed to be effective as if included in IIRIRA. Section 309(c)(5) now reads, in relevant part:

> (5) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION –
>
> (A) IN GENERAL – Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act), as in effect before [April 1, 1997], issued before, on, or after the date of enactment of this Act [September 30, 1996].
>
> (B) EXCEPTION FOR CERTAIN ORDERS – In any case in which the Attorney General elects to terminate and reinitiate proceedings in accordance with paragraphs (1) and (2) of Section 240A(d) of the Immigration and Nationality Act shall not apply to an Order to Show Cause issued before April 1, 1997.

As enacted by IIRIRA, new Immigration and Nationality Act (hereinafter "INA") Section 240A(d), in turn

specifies the manner in which "continuous physical presence" is to be computed:

> (1) *For purposes of this section,* any period of continuous physical presence in the United States shall be deemed to end when the alien is *served a notice to appear under section 239(a)* or when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible . . . or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.
>
> (2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsection (b)(1) and (b)(2) *if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.*

INA Section 240A(d) (1) and (2) (emphases added).

In the present case, the Ninth Circuit Court of Appeals summarily dismissed the petition solely on statutory ineligibility, citing IIRIRA Section 309(c)(5) and its own incorrect decision, *Ram v. INS*, 243 F.3d 510 (9th Cir. 2001). The Ninth Circuit Court of Appeals' decision was in error because the new provisions under INA Section 240A(d) (1) and (2) do *not* apply to applicants, like the Villarreals, who were applying for suspension of deportation. *See* IIRIRA Section 309(c)(1)(A) and (B).

Current IIRIRA Section 309(c)(5) specifies that INA Section 240A(d)(1) applies to "orders to show cause (including those referred to in section 242B(a)(1) of the [INA], as in effect before April 1, 1997]), issued before,

on, or after the date of [IIRIRA's] enactment." This language does not in any way indicate that the stop-time rule applies to *all* orders to show cause. On the contrary, IIRIRA Section 309(c)(5)(A)'s language that Section 240A(d) "shall apply to orders to show cause" can have only the following possible meanings:

> (1) INA Section 240A(d) applies only to those cases where IIRIRA Section 309(c)(2) is invoked;[2] or, in the alternative,
>
> (2) INA Section 240A(d) applies to deportation proceedings (initiated by Orders to Show Cause) by deeming the period of continuous physical presence to end when the applicant has committed a relevant criminal offense that renders him or her deportable (Section 240A(d)(1)), or when the applicant has certain absences (Section 240A(d)(2)).

The only way that one of these triggering events could take place "for purposes of this section" (i.e. for purposes of applications for cancellation of removal under INA Section 240A) in a proceeding, like the Villarreals', which is initiated by an Order to Show Cause, is in a case where IIRIRA Section 309(c)(2) is invoked. The plain language of Section 240A(d)(1) "For purposes of this section" indicates that this statute applies only to cases where there are applications for relief under INA Section 240A, namely cancellation of removal. One can

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[2] In those proceedings where an OSC was issued but no evidentiary hearing was commenced as of April 1, 1997, IIRIRA Section 309(c)(2) permits the Attorney General to elect to proceed under the INA as amended by IIRIRA, as if the proceedings were initiated by a Notice to Appear.

only apply for such relief in removal proceedings, or in proceedings where the removal regime applies. Even taking into consideration cases covered by the transition rule, IIRIRA Section 309(c)(5)(A) and INA Section 240A(d)(1) would only apply to cases where an alien was served with an order to show cause (including pursuant to former Section 242B(a)(1)), but where the alien is applying for relief under INA Section 240A. Such an occurrence is possible only when the Attorney General has invoked IIRIRA Section 309(c)(2) in a case initiated by an Order to Show Cause and elects to proceed under the new sections of law created by IIRIRA. An individual in such proceedings would then be eligible to apply for cancellation of removal, rather than suspension of deportation, and thus Section 240A would apply. INA Section 240A does not apply in any other cases initiated by an Order to Show Cause as such persons are not eligible to apply for Cancellation of Removal.

Alternatively, if the phrase "[f]or purposes of this section" is not interpreted to refer only to applications for relief under that section, namely INA Section 240A, then IIRIRA Section 309(c)(5)(A) would apply to some applications for suspension of deportation initiated by orders to show cause. Again, under the plain language of INA Section 240A(d), however, the effect of that section on suspension applicants is to cause the period of continuous presence to end *only* when the alien commits an offense enumerated in that section that renders him or her inadmissible or removable or if the alien has certain absences.

Therefore, IIRIRA Section 309(c)(5) can apply to cases initiated by Orders to Show Cause in the above two ways.

However, the service of an Order to Show Cause will *not* terminate the period of continuous physical presence (with the exception of those cases in which IIRIRA Section 309(c)(2) is invoked) because service of a charging document can only cut off continuous physical presence when the charging document is a "notice to appear under section 239(a)". INA Section 240A(d).

In *Ram*, the Ninth Circuit Court of Appeals recognized the possible validity in the above interpretation of the statute. The Ninth Circuit found that "the statute's plain language is not free from ambiguity." *Ram*, 243 F.3d at 515. Further, the Ninth Circuit Court of Appeals specifically found that

> the "for purposes of this section" language in the stop-time rule does not, as Petitioners suggest, *necessarily* limit the scope of IIRIRA Section 309(c)(5)(A) to removal proceedings. *Ram*, 243 F.3d at 515 (emphasis added).

The word "necessarily" indicates that there is a possibility that the Petitioners' interpretation is the correct interpretation. In other words, IIRIRA Section 309(c)(5) and specifically the language regarding OSCs can sustain more than one interpretation. Therefore, the language of the statute does not have the clarity and "unambiguous direction" as required by the standards articulated in *St. Cyr*.

The Ninth Circuit Court of Appeals attempted to resolve this ambiguity by looking to legislative history. This reasoning is faulty. The legislative history indicates that Congress was indeed aware of the ambiguities present in the stop-time rule. In fact, in approving the

changes made by NACARA, Congress was clearly aware of the dispute over the interpretation of former Section 309(c)(5). *See Matter of N-J-B-*, Int. Dec. 3309 (BIA 1997). Therefore, it seems only logical that had Congress wished to make Section 309(c)(5) applicable to suspension of deportation cases, it would have indicated so in the statute without any ambiguities.

In fact, had Congress intended for the initiation of deportation proceedings to terminate an alien's continuous presence *in every case* (including suspension cases), it would have chosen to include such language in Section 240A(d) or at least, would have done so through IIRIRA's transitional section 309(c)(5) or when it enacted NACARA and referenced that section on several occasions. Congress had several separate opportunities to include such language in the statute. Given the presumption that Congress acts intentionally when it "includes particular language in one section of a statute but omits it in another," the fact that Congress did not use unambiguous language in IIRIRA Section 309(c)(5) is a strong indication that it did not intend a previously issued OSC under the suspension of deportation laws to be treated as a Notice to appear under Section 239(a).

Removal proceedings under IIRIRA Section 309(c)(2) were never initiated against the Villarreals. The Villarreals have never committed any offense in the United States. Nor have they had any absences at all since their lawful entry. Therefore, applying the "stop-time rule" to their case does not comport with the plain language of the statute.

2.

DEPRIVING ALIENS OF SUSPENSION RELIEF PRODUCES AN IMPERMISSIBLY RETROACTIVE EFFECT FOR ALIENS, SUCH AS THE VILLARREALS, WHO WERE STATUTORILY ELIGIBLE FOR SUSPENSION RELIEF PRIOR TO APRIL 1, 1997 BUT DID NOT HAVE THE MERITS OF THEIR CASE HEARD PRIOR TO THAT DATE.

In *Ram v. INS*, the Ninth Circuit Court of Appeals erred in finding that Congress clearly demonstrated its intent to have IIRIRA Section 309(c)(5) apply retroactively to cases such as the Villarreals'. The Ninth Circuit further erred in stopping its analysis on impermissible retroactivity at that point and not applying the retroactivity analysis as laid out in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) to the present issue.

This Court has recently found that

> "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' " [Citation omitted]. A statute has retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." [Citations omitted.] As we have repeatedly counseled, the judgment whether a particular statute acts retroactively "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.' " *INS v. St. Cyr*, 121 S.Ct. 2271, 2290-2291 (2001).

In the present case, retroactive application of the statute does indeed take away vested rights. On March 28, 1996, the Villarreals admitted the factual allegations in the Order to Show Cause and conceded deportability in reliance on the fact that they were statutorily eligible for relief from deportation.

They remained statutorily eligible for suspension relief from October 26, 1996 until April 1, 1997. During that time, they could have been granted suspension of deportation, and indeed, the Immigration Judge stated that their applications were favorable. See Immigration Judge's decision, App. 3-5. The Villarreals conceded deportability based on their reliance on the fact that they could apply for relief from deportation.

The retroactive application of the stop-time rule to the Villarreals' case took away statutory eligibility for the relief from deportation upon which the Villarreals had relied in conceding deportability. Suddenly, they were no longer eligible to apply for any form of relief from deportation.

As this Court has recently found, "There is a clear difference, for the purposes of retroactive analysis, between facing possible deportation and facing certain deportation." *INS v. St. Cyr*, 121 S.Ct. 2271, 2293 (2001), citing *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

The application of IIRIRA Section 309(c)(5) to the present case would attach new legal consequences to actions already completed and would therefore have an impermissibly retroactive effect.

II.

THE NINTH CIRCUIT COURT OF APPEALS CASE-LAW HAS CREATED A SITUATION WHICH VIOLATES THE EQUAL PROTECTION RIGHTS OF APPLICANTS SUCH AS THE VILLARREALS WHO WERE IN PROCEEDINGS AND STATUTORILY ELIGIBLE FOR SUSPENSION OF DEPORTATION PRIOR TO APRIL 1, 1997 BUT WERE UNABLE TO HAVE THEIR CASES HEARD UNTIL AFTER IIRIRA BECAME EFFECTIVE.

The Supreme Court has repeatedly stressed the paramount authority of the executive and legislative branches of our national government with respect to immigration matters. *See, e.g., Fiallo v. Bell*, 430 U.S. 787 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765-767 (1972). Congress' exercise of such power, if predicated on a rational basis, may distinguish between classes of aliens and confer benefits on one or more classes that are not available to others. *See Mathews*, 426 U.S. at 81-84. However, classifications which distinguish among similarly situated groups of aliens must be denied if the classification is not supported by a facially legitimate and bona fide reason. *See Fiallo*, 430 U.S. at 794; *Kleindienst*, 408 U.S. at 770; *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996). The Supreme Court has specifically held that different classifications of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The Ninth Circuit Court of Appeals has found that "the stop-time rule" applies to suspension of deportation cases heard by an IJ or on appeal after IIRIRA took effect. *Ram v. INS*, 243 F.3d at 514. The Ninth Circuit Court of Appeals also held that IIRIRA Section 309(c)(5) does not apply to suspension hearings held before April 1, 1997, the effective date of IIRIRA. *Guadalupe-Cruz v. INS*, 240 F.3d 1209 (9th Cir., 2001).

Section 309(c)(5) as interpreted by *Ram* and *Guadalupe-Cruz* creates two groups of similarly situated individuals who are treated differently. Those applicants who had accumulated seven years' continuous presence before April 1, 1997 and had their cases heard prior to the enactment of IIRIRA remained statutorily eligible for suspension despite the fact that they had not accumulated seven years prior to the service of the Order to Show Cause. Those applicants in an identical situation except for the fact that they were not fortunate enough to have their cases heard prior to April 1, 1997 are statutorily ineligible for suspension relief.

The results of this seemingly clear-cut law are unjust and random for applicants in the Villarreals' situation for the following reasons. The law regarding the application of the stop-time rule remained unsettled for a period of time before April 1, 1997. Immigration Judges who wanted to grant a case but believed they were barred by the stop-time rule often continued the case to see how the law would be decided rather than flat out deny the case.

To make matters worse, on February 11, 1997, Judge Creppy issued a memo to all immigration judges prohibiting the granting of suspension cases because IIRIRA

Section 309(c)(7) had imposed a cap of 4000 suspension grants effective April 1, 1997. Subsequent amendments to the statute demonstrate that the cap did not in fact apply to cases prior to April 1, 1997. *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999). Despite the lack of any statutory authority, this memo in effect prevented the Villarreals and applicants in a similar situation from having their cases heard while they were still statutorily eligible for relief.

During the months preceding April 1, 1997, because of the Creppy memo and uncertainty as to how the stop-time rule would be applied, Immigration Judges were not allowed to grant suspension cases that could potentially be barred by Section 309(c)(5). Therefore, during that period, if an Immigration Judge wanted to grant a suspension case that would be affected by Section 309(c)(5), he or she would have no choice but to continue the case in the hopes that the law would allow them to grant it at a later date. During that period, they could only adjudicate those cases they were willing to deny.

Ironically, the *Ram* and *Guadalupe-Cruz* holdings create a situation in which applicants whose cases were continued past April 1, 1997 are no longer statutorily eligible for suspension relief while those applicants whose cases were denied prior to April 1, 1997 are now statutorily eligible for relief. This result is random at best. It is peculiar and unjust given the circumstances surrounding the stop-time rule in the months preceding its effective date.

Furthermore, there is no rational basis for this distinction. The *Ram* Court found that "Congress . . . enacted

the stop-time rule set forth in IIRIRA . . . motivated by the belief that 'suspension of deportation is often abused by aliens seeking to delay proceedings until seven years have accrued . . . even after they have been placed in deportation proceedings.' " *Ram v. INS*, 243 F.3d at 518, citing H.R. Rep. No. 104-469(I) at 390 (1996).

If that is indeed the purpose of the statute, it is not logical to apply the stop-time rule to the present case. The Villarreals did not abuse suspension of deportation relief. *They* did not delay proceedings. Rather, they were the victims of delays beyond their control. To penalize them for these delays does not satisfy any stated purpose of the statute.

In the present case, the Villarreals were already in deportation proceedings as of April 1, 1997, the effective date of IIRIRA. The Villarreals were put into deportation proceedings on September 7, 1995, well before the stop-time rule went into effect. As of October 26, 1996, they were in deportation proceedings *and* had accumulated seven years' continuous presence. IIRIRA Section 309(c)(5) went into effect on April 1, 1997. Therefore, there was a large window of time in which the Villarreals were in deportation proceedings, had accumulated the requisite continuous presence, and the stop-time rule was not yet in effect. During that time, they were statutorily eligible for suspension of deportation but were not able to have the merits of their cases adjudicated.

The Villarreals had a hearing in immigration court scheduled for October 28, 1996. At that point, they were statutorily eligible for suspension. They could have had their hearing at any time prior to April 1, 1997.

On November 27, 1996, they submitted their suspension applications with supporting documents. They still remained statutorily eligible for suspension until April 1, 1997 when IIRIRA Section 309(c)(5) went into effect, changing the law on continuous presence.

The Immigration Judge could have heard their case at this date or any other date before April 1, 1997. The Immigration Judge's decision to set the case over to a date after the law changed was either an arbitrary, administrative decision or a decision motivated by the fact that had she wanted to grant the Villarreals' case prior to April 1, 1997, she would have been prevented from so doing by the Creppy memo.[3] In either scenario, the Villarreals had absolutely no control over this decision, and should not be penalized for it.

The Villarreals were statutorily eligible for suspension relief prior to April 1, 1997. For reasons beyond their control, their cases were continued to a time when they were no longer statutorily eligible for such relief. The Ninth Circuit Court of Appeals' failure to address the issue of applicants in the Villarreals' situation is a glaring omission. In fact, it is random and patently unfair to apply the stop-time rule in such cases.

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[3] In the present case, it appears that the Immigration Judge did want to grant the applications. In her Oral Decision, the Immigration Judge stated: "These are very favorable applications. I'm very impressed with the family, the written form already and I have no doubts that they could be consistent orally, how be it they choose not to make an advisory decision. I have no choice today, however, because the law is very severe and is still being interpreted in this matter." See Oral Decision and Order, App. 3-5.

For the above reasons, application of the stop-time rule to the present case would violate the Villarreals' equal protection rights.

CONCLUSION

Based on the foregoing, the Villarreals respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

ARIELLE BASES, ESQ.
Counsel of Record
LAW OFFICE OF ARIELLE BASES
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Encino, CA 91436
(818) 905-1144

ENRIQUE AREVALO, ESQ.
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Attorneys for Petitioners

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHELO HENRY VILLARREAL-ALARCON; ROXANA C. VILLARREAL; ITALO H. VILLARREAL-JURGENS; GINO A. VILLARREAL-JURGENS, Petitioners, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent,	No. 00-70455 Agency Nos. A70-960-320 A70-960-321 A70-960-322 A70-960-323 MEMORANDUM[1] (Filed Mar. 28, 2001)

On Petition for Review of an Order of the board of Immigration Appeals

Submitted March 12, 2001[2]

Before: WALLACE, SILVERMAN, and W. FLETCHER, Circuit Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Chelo Henry Villarreal-Alarcon, Roxana C. Villarreal, Italo H. Villarreal-Jurgens, and Gino A. Villarreal-Jurgens petition for review of their final order of deportation entered by the Board of Immigration Appeals ("BIA") on March 31, 2000. Petitioners were served with orders to show cause on December 5, 1995, approximately six years and two months after they entered the United States. At a hearing on December 1, 1997, the immigration judge denied their applications for suspension of deportation because they had failed to meet the continuous physical presence requirement before being served with the orders to show cause and thus were statutorily ineligible for suspension. On appeal, the BIA affirmed.

Petitioners contend that they were eligible for suspension of deportation and challenge the BIA's decision that the "stop-time rule," a new continuous physical presence requirement set forth in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-625, bars such relief in their case. Petitioner's arguments challenging the application of the stop-time rule are foreclosed by our recent decision in *Ram v. INS*, No. 99-70918, 2001 WL 173309 (9th Cir. Feb. 8, 2001). We do not consider their eligibility, if any, for relief under the class action pending in the district court in accordance with *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999), *supplemental opinion*, 236 F.3d 1115 (9th Cir. 2001). Our resolution of this case does not affect any interim or permanent relief awarded to members of the class certified in *Barahona-Gomez*.

PETITION FOR REVIEW DENIED.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Los Angeles, California

File No.: A 70-960 320
A 70 960 321
A 70 960 322
A 70 960 323

December 1, 1997

In the Matters of
ACHELO HENRY VILLARREAL ALARCON
and
ROXANA C. VILLARREAL
and
ITALO VILLARREAL
and
GINO VILLARREAL
Respondents

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(B) of the I&N Act Overstay.

APPLICATIONS: Initially Asylum then Withdrawn; Suspension of Deportation; Voluntary Departure

ON BEHALF OF RESPONDENTS:	ON BEHALF OF SERVICE:
Enrique Arevalo, Esquire 505 Mission Street South Pasadena, CA 91030	Carey Harlan, Esquire Assistant District Counsel U.S. INS Los Angeles, CA 90012

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents' hearing consists of a family unit parents and two offsprings. They were brought under deportation proceedings by an Order to Show Cause, issued and served September 7, 1995. Through Counsel allegations of fact were admitted, deportability conceded. Deportability is not an issue in this case. Should be noted that the plea was taken March of 1996 and only because of the calendar was it not scheduled till October 28, 1996. This is an important distinction because I've poured so much work into this Los Angeles District case perhaps for an entirely different decision had it been scheduled before September 30, 1996. There was no continuance by either side nor by the Court's on availability. Since October 28, 1996, however, four continuances have resulted. However, today it has to be decided since it's been on the docket three other times. I am reluctant to proceed because of the 309(c)(5) issue.

These are very favorable applications. I'm very impressed with the family, the written form already and I have no doubts that they could be consistent orally, how be it they choose not to make an advisory decision. I have no choice today, however, because the law is very severe and is still being interpreted in that matter. Because the respondents' lack the seven years of continuous physical

presence between the issuance of the Order to Show Cause and service and the entry, I must today, December 1st, deny the applications for Suspension of Deportation. This is solely done under the 309(c)(5) issue and certainly any change will immediately be considered and scheduled even on an administrative time, so I can complete my determination or deem relief available in the future which that, in fact, would happen.

It is now ordered that the application for Suspension of Deportation be denied. However, I will grant the privilege of Voluntary Departure to leave on or before October 1, 1998 or any extension beyond first date that may be granted by District Director as far as the order if they choose not to depart they will be deported to their country of origin, Peru.

/s/ [Illegible]
Ingrid K. Hrycenko
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of:
VILLARREAL JURGENS, GINO A

File: A 70-960-323
in DEPORTATION Proceedings

Order of the Immigration Judge

This is a summary of the Oral Decision and Order entered on Dec 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

_ The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to

or

✓ Respondent's application for Voluntary Departure was granted to on or before 10/1/98 with an alternate Order of Deportation to Peru

✓ Respondent's application for ASYLUM was Granted / Denied. Withdrawn WITHHOLDING OF DEPORTATION was Granted / Denied.

_ A waiver under Sec. 212 (c) was Granted / Denied.

_ The Respondent was Granted / Denied adjustment of status.

✓ The Respondent's application for suspension of deportation is hereby Granted / Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

✓ Appeal reserved / waived by Service / Respondent Notice of Appeal to be filed no later than 1/1/98.

✓ Other 309(c)(5) issue denied only

Date: Dec. 1, 1997

Ingrid K. Hrycenko
Ingrid K. Hrycenko
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of:
VILLARREAL JURGENS, ITALO R

File: A 70-960-322
in DEPORTATION
Proceedings

Order of the
Immigration Judge

This is a summary of the Oral Decision and Order entered on Dec 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

_ The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to

or

✓ Respondent's application for Voluntary Departure was granted to on or before 10/1/98 with an alternate Order of Deportation to Peru

✓ Respondent's application for ASYLUM was Granted / Denied. Withdrawn WITHHOLDING OF DEPORTATION was Granted / Denied.

_ A waiver under Sec. 212 (c) was Granted / Denied.

_ The Respondent was Granted / Denied adjustment of status.

✓ The Respondent's application for suspension of deportation is hereby Granted / Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

✓ Appeal reserved / waived by Service / Respondent Notice of Appeal to be filed no later than 1/1/98.

_ Other _____

_____

Date: Dec. 1, 1997

Ingrid K. Hrycenko
Ingrid K. Hrycenko
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of:
VILLARREAL, ROXANNA C

File: A 70-960-320
In DEPORTATION Proceedings

Order of the Immigration Judge

This is a summary of the Oral Decision and Order entered on Dec. 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

-- The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to

or

✓ Respondent's application for Voluntary Departure was granted to on or before 10/1/98 with an alternate Order of Deportation to Peru

✓ Respondent's application for ASYLUM was Granted / Denied. Withdrawn WITHHOLDING OF DEPORTATION was Granted / Denied.

_ A waiver under Sec. 212 (c) was Granted / Denied.

_ The Respondent was Granted / Denied adjustment of status.

✓ The Respondent's application for suspension of deportation is hereby Granted / Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

✓ Appeal reserved / waived by Service / Respondent Notice of Appeal to be filed no later than 1/1/98.

✓ Other 309(c)(5) issue denied

Date: Dec. 1, 1997

Ingrid K. Hrycenko
Ingrid K. Hrycenko
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CA

In the Matter of:
VILLARREAL ALARCON,
CHELO HENRY

File: A 70-960-321
In DEPORTATION
Proceedings

Order of the
Immigration Judge

This is a summary of the Oral Decision and Order entered on Dec 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision and Order will be transcribed and will become the official opinion in this case.

_ The Respondent's application for Voluntary Departure was denied and he/she was ordered deported to

or

✓ Respondent's application for Voluntary Departure was granted to on or before 10/1/98 with an alternate Order of Deportation to Peru

✓ Respondent's application for ASYLUM was Granted / Denied. Withdrawn WITHHOLDING OF DEPORTATION was Granted / Denied.

_ A waiver under Sec. 212 (c) was Granted / Denied.

_ The Respondent was Granted / Denied adjustment of status.

✓ The Respondent's application for suspension of deportation is hereby Granted / Denied.

_ The proceedings were terminated.

_ The Respondent was ordered deported to

✓ Appeal reserved / waived by Service / Respondent Notice of Appeal to be filed no later than _____.

✓ Other 309(c)(5) denial only

Date: Dec. 1, 1997

Ingrid K. Hrycenko
Ingrid K. Hrycenko
Immigration Judge

ALIEN NUMBER: 70-960-321 NAME: VILLARREAL ALARCON, CHELO HENRY

LIMITATION ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a deportation hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond you control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years after the date of entry of the final order of deportation.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being

found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of five (5) years from the date of your scheduled hearing.

(X) 3. You have been granted voluntary departure from the United States pursuant to section 244(e)(1) of the Immigration and Nationality Act. Remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years from the date of scheduled departure or the date of unlawful reentry, respectively.

( ) 4. A final order of deportation has been entered against you. If you fail to appear for deportation at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for five (5) years after the date you are scheduled to appear.

** The term "Exceptional circumstances" refers to exceptional circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM DEPORTATION FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 242(b) of the Immigration and Nationality Act;

2) Suspension of deportation or voluntary departure as provided for in section 244(e) of the Immigration and Nationality act; and

3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English and in Spanish. Oral notice of the contents of this notice was given to the alien in his/her native language, or in a language he/she understands.

Date: Dec. 1, 1997

Immigration Judge: /s/ [Illegible]
or
Clerk of the Court: _____ WZ

[SEAL] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Arevalo, Enrique
505 Mission Street,
South Pasadena, CA 91030

Office of the
District Counsel/LO
606 S. Olive Street,
8th Floor
Los Angeles, CA 90014

Name: VILLARREAL ALARCON, CHELO HENRY

A70-960-321

Date of this notice: 03/31/2000

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours,

/s/ Paul W. Schmidt
Paul W. Schmidt
Chairman

Enclosure

Board's order also includes A70 960 320/322/323

Panel Members:
DUNNE, MARY M.
GUENDELSBERGER, JOHN
HOLMES, DAVID B.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A70 960 321 – Los Angeles Date: MAR 31 2000
A70 960 320
A70 960 322
A70 960 323

In re: CHELO HENRY VILLARREAL-ALARCON
ROXANA C. VILLARREAL
ITALO H. VILLARREAL-JURGENS
GINO A. VILLARREAL-JURGENS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: John Ayala, Esquire

ON BEHALF OF SERVICE: Kerri A. Harlin
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] –
In United States in violation of law

APPLICATION: Suspension of deportation

ORDER:

PER CURIAM. The respondents have appealed only that portion of the Immigration Judge's decision denying their applications for suspension of deportation under

section 244(a) of the Immigration and Nationality Act. The appeal is dismissed. The request for oral argument before the Board is denied. 8 C.F.R. § 3.1(e).

On appeal, the respondents argue that the Immigration Judge erred in finding them statutorily ineligible for suspension of deportation under section 244(a) of the Act. We find no error. For purposes of determining eligibility for suspension of deportation, the period of continuous physical presence ends at the service of the Order to Show Cause and Notice of Hearing (Form I-221) on the alien, irrespective of the date that it was issued. *See Matter of Nolasco,* Interim Decision 3385 (BIA 1999).

In the present case, the record reflects that the respondents entered the United States on or about October 26, 1989. *See* Exh. 1. The Orders to Show Cause were served on the respondents on December 12, 1995, before they had acquired 7 years of continuous physical presence in this country. *Id.* The respondents are thus unable to satisfy the statutory physical presence requirement now in effect and accordingly have failed to meet their burden of establishing prima facie eligibility for suspension of deportation. Because we find the lack of requisite physical presence dispositive in terms of the respondents' eligibility for suspension of deportation, we need not address the other arguments raised by the parties.

The respondents also raise arguments on appeal regarding the constitutionality of the changes in the law. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos,* 21 I&N Dec. 905 (BIA 1997); *Matter of C-,* 20 I&N Dec. 529 (BIA 1992).

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondents shall be deported as provided in the Immigration Judge's order.

/s/ John Guendelsberger
FOR THE BOARD

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHELO HENRY VILLARREAL-ALARCON; ROXANA C. VILLARREAL; ITALO H. VILLARREAL-JURGENS; GINO A. VILLARREAL-JURGENS, Petitioners, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 00-70455 INS Nos. A70-960-321 A70-960-320 A70-960-322 A70-960-323 ORDER FILED JUN 8 2001

Before: WALLACE, SILVERMAN and W. FLETCHER, Circuit Judges

Petitioners' petition for penal rehearing is denied.